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No. 418

In the

Supreme Court of the United States

October Term, 1953

FEDERAL POWER COMMISSION,

Petitioner,

v.

STATE OF WISCONSIN, PUBLIC SERVICE COMMISSION OF WISCONSIN, et al.

On Petition For a Writ of Certiorari to the United States Court of Appeals For the District of Columbia Circuit

JOINT BRIEF IN OPPOSITION TO GRANTING OF WRIT

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OPINIONS BELOW

The opinion and order of the Federal Power Commission (R. 1682-1835) with the dissenting opinion of Commissioner Buchanan is reported in 90 PUS (NS) 325. The opinion of the Court of Appeals (R. 1857-1873) is reported in 205 F. 2d 706.

JURISDICTION

The jurisdictional requisites are adequately set forth in the petition.

QUESTION PRESENTED

1. Whether Phillips Petroleum Company is a "natural gas company" within the meaning of the Natural Gas Act and subject to the jurisdiction of the Federal Power Commission to fix rates at which Phillips sells natural gas at wholesale to five interstate pipeline companies for interstate transportation and resale.

STATUTES INVOLVED

The pertinent provisions of the Natural Gas Act (15 U. S. C. 717, et seq.) are printed in Appendix A to this brief.

STATEMENT OF THE CASE

As noted in the petition (page 1 footnote 1), petitions for writs of certiorari seeking review of the judgment of the Court of Appeals sought to be reviewed here have been filed in Nos. 280 and 281 this term, and we adopt as our statement of the case here that contained at pages 2 to 4 of our brief in opposition in Nos. 280 and 281.

ARGUMENT

1. The question here is whether *Phillips Petroleum Company* is a "natural gas company" within the meaning of the Natural Gas Act and subject to jurisdiction of the Federal Power Commission to fix rates at which Phillips sells natural gas at wholesale to five interstate pipeline

companies for interstate transportation and sale for resale and *not* that stated by petitioner at petition page 7 under the heading "Reasons for Granting the Writ," where it is said the question is whether "independent producers and gatherers of gas in the field who sell directly to interstate pipeline companies at the point where gathering is complete, are, by reason of such sales, subject to regulation under the Federal Natural Gas Act."[1]

The answer to the specific question concerning Phillips depends upon the *specific* acts and transactions engaged by Phillips which include, as found by the Power Commission (R. 1712, 1740), (a) sales in interstate commerce of natural gas for resale for ultimate public consumption, and (b) transportation of natural gas in interstate commerce, both of which bring Phillips within the affirmative jurisdictional provisions of Section 1 (b) and a natural gas company as defined by Section 2 (6) of the Natural Gas Act. *Federal Power Commission v. East Ohio Gas Co.*, 338 U. S. 464, 468 (1950).

The status of the so-called "independent producers and gatherers"[2] under the Natural Gas Act, of which it is indicated there may be a large number (petition p. 7 n. 4), must depend upon the *particular facts* applicable to each,

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[1]Note the question as stated in the argument at page 7 of the petition is broader than the question as stated page 2 of petition which is specifically limited to the situaution confronting Phillips.

[2]The designation "independent producers and gatherers" is an industry-given term without special legal meaning. It describes a company that does not own or operate an interstate transmission pipeline or is not affiliated with one that does. Petition in No. 280, p. 4; petition in No. 281, p. 7. It should not be considered that because of this label activities of an "independent producer and gatherer" are necessarily confined to "production or gathering" and that it automatically follows that companies given such labels are within the provisions of Section 1(b) of the Natural Gas Act which excludes Power Commission jurisdiction over "production or gathering."

which of course are not available and cannot be passed upon in this case. It is, therefore, wrong to claim, as is claimed in the petition page 8, that the question here involved "would mandatorily bring within the Commission's jurisdiction this whole segment of the natural gas industry * * *." Even Phillips in its petition in No. 280 only says (pp. 12-13) in referring to the 2300 so-called "independent producers and gatherers" that "*presumably* some or all of the *sales*" (emphasis ours) must be regulated if the decision of the Court of Appeals here is correct.

2. The decision of the Court of Appeals here involved is in accord with prior decisions of this court and of courts of appeals which directly settle the questions here involved, and it is correct. *There is no conflict of decisions.*

The governing principle is one of constitutional law, namely, that sales of natural gas in interstate commerce for resale, are beyond the constitutional competence of the states to regulate. For that reason the sales by Phillips to the five interstate pipeline companies for resale cannot as a matter of law be included in the portion of Section 1 (b) of the Natural Gas Act (15 U. S. C. 717 (b)) excluding Federal Power Commission jurisdiction over "production or gathering." *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 689-90 (1947).

The applicable cases of this court in addition to *Interstate Natural Gas Co. v. Federal Power Comm., supra,* are *Illinois Natural Gas Co. v. Central Illinois Public Service Co.*, 314 U. S. 498 (1942); *Federal Power Comm. v. Hope Natural Gas Co.*, 320 U. S. 591 (1944); *Colorado Interstate Gas Co. v. Federal Power Comm.*, 324 U. S. 581 (1945); *Panhandle Eastern Pipe Line Co. v. Public Service Comm.*

of Indiana, 332 U. S. 507 (1947); *Federal Power Comm. v. East Ohio Gas Co.*, 338 U. S. 464 (1950); *Panhandle Eastern Pipe Line Co. v. Michigan Public Service Comm.*, 341 U. S. 329 (1951); *United States v. Public Utilities Comm.*, 345 U. S. 295 (1953) 311.

The applicable Court of Appeal cases are *Peoples Natural Gas Co. v. Federal Power Comm.*, 75 U. S. App. D. C. 235, 127 F. 2d 153 (1942), certiorari denied 316 U. S. 700; *Interstate Natural Gas Co. v. Federal Power Comm.*, (C. A. 5) 156 F. 2d 949 (1946), affirmed 331 U. S. 682. The case before this court was given particular consideration in *State Corporation Comm. of Kansas v. Federal Power Comm.*, (C. A. 8) No. 14704, and *Northern Natural Gas Co. v. Federal Power Comm.*, (C. A. 8) Nos. 14706, 14733 and 14743, decided July 20, 1953, — F. 2d —, wherein the court said:

> "We are not in disagreement with the decision of the Court of Appeals for the District of Columbia in this Phillips Case."

3. The legislative history relied on by petitioner (pp. 9-11) consists of the DeVane statements on H. R. 11662, 74th Congress, 2d Session, a predecessor bill known as the Lea Bill,[3] which differs in important particulars from H. R. 6586, which later became the Natural Gas Act. A copy of the jurisdictional provisions of both appears at R. 1835.

This court has reviewed the legislative history of the Natural Gas Act on numerous occasions, and what it relied on (as did the Court of Appeals here) are the House and Senate Committee Reports on H. R. 6586, which be-

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[3]The Lea Bill did not include within its scope sales for resale in interstate commerce, as did the later bill which became the Natural Gas Act.

came the Natural Gas Act. *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, 689-90 (1947); *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, (1949) 502 note 2, 503 note 3, and 509 note 15.

The DeVane material on H. R. 11662 cannot properly be relied on. It was rejected by the Court of Appeals in *Interstate Natural Gas Co. v. Federal Power Comm.*, (C. A. 5) 156 F. 2d 949 (1946), because of the difference between the bills and on appeal the same material was called to the attention of this court in petitioner's brief in *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682 (1947), (see petitioner's Brief, Case No. 733, October Term 1946 p. 33-39) and was not given effect by this court in its decision.

The contentions of the Federal Power Commission as to the significance of the DeVane comments on the predecessor bill H. R. 11662 in 1946 are inconsistent with its contentions now. In the brief of the Federal Power Commission in opposition to certiorari in the *Interstate Case* (No. 733 October Term 1946) it told this court (pp. 13-14):

> "With respect to the legislative history of the Act, petitioner quotes at length from the testimony of Mr. Dozier DeVane, former Solicitor of the Federal Power Commission, in connection with predecessor bill H. R. 11662 containing different jurisdiction provisions from that enacted. We do not contend that the legislative history of a predecessor bill may not be resorted to in a proper case, if necessary, as an aid to ascertaining the intention of Congress. *It is submitted, however, that where, as here, the language of the Act is clear and the Committee reports on the final bill enacted are explicit on the questions at issue, statements of wit-*

nesses on a bill not enacted and not even reported are entitled to no weight and that therefore the court below properly relied upon the legislative history of the final bill enacted. The statements of Mr. DeVane, however, when studied in the light of the actual facts as to H. R. 11662, *not only do not support petitioner's contentions, but actually leave do doubt that sales of gas in interstate commerce for resale, even when made, as here, in the producing field, were intended to come within the jurisdiction of the Commission.*" (emphasis ours)

4. Administrative construction is erroneously relied on at pages 11-13 of the petition. The Power Commission has never adopted a uniform course sufficient to give any weight to its so-called administrative construction. The details appear in Commissioner Buchanan's dissent. R. 1801 et seq.[4] Here we need only the statement of this court in *Federal Power Comm. v. Panhandle Eastern Pipe Line Co.*, 337 U. S. 498, 516-7 note 25 (1949), as to the "uncertainty of opinion in the Commission as to the reach of the Act toward sales by independent producers and gatherers of natural-gas companies for transportation in interstate commerce." In debate on the Kerr Bill, S. 1498, Senator O'Mahoney stated that the Power Commission "has wobbled all over the face of the earth with respect to this problem." Cong. Rec. 81st Cong., 2d Sess., p. 4171.

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[4]For example, the views of the Power Commission in **Re Interstate Natural Gas Co.**, 3 F. P. C. 416 (1943) are squarely contrary to the views expressed by it in this case.

5. The petition says no decision of this court required the Commission to find coverage in this case.[1] This we deny. *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682, involved sales in the field by Interstate to three pipeline companies, each of which transported the gas so sold to markets in other states for resale for ultimate public consumption. Federal Power Commission jurisdiction under the Natural Gas Act to fix rates for such sales for resale was sustained. The court said that such sales for resale were beyond the constitutional competence of the states to regulate (pp. 689, 690, 692); that the provision in Section 1 (b) excluding Power Commission jurisdiction over "production or gathering" was to preserve in the states power to regulate in areas where the states are constitutionally competent to act. (p. 690) These principles so laid down *compel* the conclusion (whether by the Federal Power Commission or a court) that the sales in interstate commerce of natural gas for resale by Phillips here involved are not and cannot as a matter of law fall within the exemption over "production or gathering."

6. Contrary to what is suggested at page 17 of the petition, there is ample authority by this court that the jurisdictional exemption in Section 1 (b) of the Act over "production or gathering" refers to *physical* production and gathering. *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682 (1947) 690.

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[1]Petitioner refers (pp. 13-14) to the alleged "expertise" of the Commission and to its alleged expert judgment in applying the statutory standard. The determinative questions are questions of law. At the time of the decision four of the five commissioners were not lawyers. The only lawyer (Commissioner Buchanan) dissented. The staff of the Commission advised the Commission that it had jurisdiction. R. 1747. Under the circumstances any point rested on this so-called "expertise" must fall. Also such doctrine cannot be used to work a result contrary to the provisions of the Natural Gas Act, a result which petitioners here seek.

7. Contrary to what is suggested at page 17 of the petition, the sales for resale here involved fall within the regulatory gap which the Natural Gas Act was designed to fill. *Interstate Natural Gas Co. v. Federal Power Comm.*, 331 U. S. 682 (1947); *Peoples Natural Gas Co. v. Federal Power Comm.*, 75 U. S. App. D. C. 235, 127 F. 2d 153 (1942), certiorari denied 316 U. S. 700.

CONCLUSION

The decision of the Court of Appeals is correct and fully accords with the applicable decisions of this court which we have cited. There is no conflict of decisions. We submit the petition for a writ of certiorari in No. 418 should be denied.

Respectfully submitted.

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APPENDIX A

Portion of Natural Gas Act (Act of June 21, 1938, c. 556, 62 821, as amended 56 Stat. 83, 15 U. S. C. §717, et seq.) which are material to questions presented.

Section 1. (a) As disclosed in reports of the Federal Trade Commission made pursuant to Senate Resolution 83 (Seventieth Congress, first session) and other reports made pursuant to the authority of Congress, it is hereby declared that the business of transporting and selling natural gas for ultimate distribution to the public is affected with a public interest, and that Federal regulation in matters relating to the transportation of natural gas and the sale thereof in interstate and foreign commerce is necessary in the public interest.

(b) The provisions of this act shall apply to the transportation of natural gas in interstate commerce, to the sale in interstate commerce of natural gas for resale for ultimate public consumption for domestic, commercial, industrial, or any other use, and to natural-gas companies engaged in such transportation or sale, but shall not apply to any other transportation or sale of natural gas or to the local distribution of natural gas or to the facilities used for such distribution or to the production or gathering of natural gas.

Section 2. When used in this act, unless the context otherwise requires—

* * *

(6) "Natural-gas company" means a person engaged in the transportation of natural gas in interstate commerce, or the sale in interstate commerce of such gas for resale.